



* 1 0 4 4 6 8 4 6 2 1 *

RECEIVED
NOV 12 2019
OKLAHOMA CITY
CLERK'S OFFICE

IN THE COURT OF CRIMINAL APPEALS FOR
THE STATE OF OKLAHOMA

THE STATE OF OKLAHOMA
ex rel. DAVID W. PRATER,
DISTRICT ATTORNEY,

Petitioner,

vs.

KENDRA COLEMAN, JUDGE OF
THE DISTRICT COURT OF
OKLAHOMA COUNTY,

Respondent.

FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA

NOV 12 2019

JOHN D. HADDEN
CLERK

No.

MA 2019 820

**BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL
JURISDICTION AND PETITION FOR WRIT OF MANDAMUS**

Oklahoma County District Court
Case No. MI-2019-916

**DAVID W. PRATER, OBA # 15,496
Oklahoma County District Attorney**

**JIMMY HARMON, OBA # 17,834
First Assistant District Attorney**

**320 Robert S. Kerr, Suite 505
Oklahoma City, OK 73102
(405) 713-1600**

TABLE OF CONTENTS

INTRODUCTION	1
STATEMENT OF THE CASE AND RELEVANT FACTS.	2
ARGUMENT AND AUTHORITIES	14
PROPOSITION I:	
The District Court on Rehearing Abused Its Discretion in Refusing to Consider the Merits of The District Attorney's Request to Disqualify Respondent.	14
A. The Rule 15 Procedures Must Be Construed To Be Harmonious With the Statues and Constitutional Provisions They are Designed To Effectuate and, Properly Construed, Are No Bar to Consideration of the State's Request to Disqualify Respondent.	15
B. The Reviewing District Court Improperly Applied the Oklahoma Pleading Code as a Basis to Justify Dismissal of the State's Recusal Request Without Necessity of an Evidentiary Hearing or Consideration of the Merits of the Issues Presented.	22
PROPOSITION II:	
Petitioner is Entitled to Mandamus Relief to Disqualify Respondent From Presiding Over All Criminal Cases in which the District Attorney's Office Appears on the Basis of Her Actual Bias and Objective Appearance of Partiality.	27
A. The State Has a Clear Legal Right to a Fair And Impartial Tribunal and to Have Respondent Categorically Disqualified Based Upon the Overwhelming and Undisputed Evidence of Bias Against the District Attorney and his Office.	28
B. Respondent's Refusal to Recuse was Clearly Erroneous as was the District Court's Refusal to Consider the Merits of the Issue of Bias on Rehearing.	34

C. The State Has No Other Adequate Remedy Under the Law to Guarantee Its Right to a Fair Trial but for Mandamus to Issue Compelling Respondent's Categorical Disqualification.	35
CONCLUSION	40
CERTIFICATE OF SERVICE	41

TABLE OF AUTHORITIES

CASE LAW

<i>Clark v. Bd. of Educ.</i> , 2001 OK 56, 32 P.3d 851	36, 37
<i>C.R.B. v. State</i> , 1978 OK CR 22, 575 P.2d 636	30
<i>Gordon v. State</i> , 2019 OK CR 24, __ P.3d __	15
<i>Ingles v. McMillan</i> , 1911 OK CR 52, 113 P. 998	18, 19
<i>Miller Dollarhide, P.C. v. Tal</i> , 2007 OK 58, 163 P.3d 548	36, 37
<i>Mitchell v. State</i> , 2006 OK CR 20, 136 P.3d 671	16
<i>Nguyen v. State</i> , 1992 OK CR 81, 844 P.2d 176	14
<i>Pierce v. Pierce</i> , 2001 OK 97, 39 P.3d 791	16
<i>Rogers v. Quicktrip Corp.</i> , 2010 OK 3, 230 P.3d 853	25
<i>State v. Adair</i> , NO. MA-2017-1059 (December 6, 2017)	19, 20, 21
<i>State v. Bednar</i> , 2019 OK 12, 441 P.3d 91	19
<i>State v. Brown</i> , 1912 OK CR 371, 126 P. 245	22, 28
<i>State v. Iven</i> , 2014 OK CR 8, 335 P.3d 264	17
<i>Vandelay Entertainment LLC v. Fallin</i> , 2014 OK 106, 343 P.3d 1273	24

<i>Wilkett v. State</i> , 1984 OK CR 16, 674 P.2d 573	30
<i>Woody v. State</i> , 1992 OK 45, 833 P.2d 257	1

STATUTES AND COURT RULES

12 O.S.2011, § 2001	26
12 O.S.2011, § 2003	25
12 O.S.2011, § 2008	25
12 O.S.2011, § 2012	25, 26
20 O.S.2011, § 1403	16, 17
25 O.S.2011, § 25	16
68 O.S.2011, § 240	8
68 O.S.2011, § 241.1	8
Rule 10.6, <i>Rules of the Oklahoma Court of Criminal Appeals</i> , Title 22, Ch. 18, Appx. (2019)	27, 28
Rule 15, <i>Rules for District Courts of Oklahoma</i> , Title 12, Ch. 2 Appx. (2019)	15, 17, 23, 26

OTHER CITATIONS

The 1215 Magna Carta: Clause 40, <i>The Magna Carta Project</i> , trans. H. Summerson et al., http://magnacarta.cmp.uea.uk (last visited Oct. 4, 2019).	1
Charles de Secondat, Baron de Montesquieu, <i>Considérations sur les causes de la grandeur des Romains et de leur décadence</i> , ch. xiv (1734) contained in <i>Œuvres complètes</i> , vol. ii, p. 144 (R. Calillois ed. 1951) (S.H. transl.).	39

**IN THE COURT OF CRIMINAL APPEALS FOR
THE STATE OF OKLAHOMA**

THE STATE OF OKLAHOMA *ex rel.*)
DAVID W. PRATER, DISTRICT)
ATTORNEY,)
)
Petitioner,)
)
)
v.) No.
)
)
KENDRA COLEMAN, JUDGE OF)
THE DISTRICT COURT OF)
OKLAHOMA COUNTY,)
)
)
Respondent.)

**BRIEF IN SUPPORT OF APPLICATION TO ASSUME ORIGINAL
JURISDICTION AND PETITION FOR WRIT OF MANDAMUS**

INTRODUCTION

“We will not sell, or deny, or delay right or justice to anyone.” The 1215 Magna Carta: Clause 40, *The Magna Carta Project*, trans. H. Summerson et al., <http://magnacarta.cmp.uea.uk> (last visited Oct. 4, 2019). This noble principle was not only enshrined in Magna Carta, but nearly 700 hundred years later it was adopted within Article 2, Section 6 of the Oklahoma Constitution. *Woody v. State*, 1992 OK 45, ¶ 9, 833 P.2d 257, 259-60. Though the principle was originally written to guard against a tyrannical king, it resounds still today.

No doubt the circumstances that lead Petitioner to the doors of this Court are unusual to say the least. It is a rare and shocking occurrence that a sitting District Judge is under active criminal prosecution by a District Attorney. As shocking as this scenario might be, it pales in comparison to the notion that the same District Judge could ever be allowed to preside over a

docket exclusively of criminal cases filed and prosecuted by the same office seeking to hold her accountable for her own criminal misdeeds. Despite this and other undisputed evidence establishing not only doubt about Respondent's ability to remain impartial in the discharge of her duties but establishing actual bias against the District Attorney's Office itself, the lower court has allowed procedural form to overtake the State's right constitutional right to due process and fundamental fairness in trial proceedings. The State now pleads for this Honorable Court to protect its sacred right to a fair trial from Respondent's oppression.

STATEMENT OF THE CASE AND RELEVANT FACTS

The events that led to this point began in *State v. Antwon Burks*, Case No. CF-2017-2859. At issue was a charge of Manslaughter in the Second Degree arising out of the mauling death of an elderly woman by vicious dogs owned by the defendant and known by him to be dangerous based upon their prior attacks. The case came on for trial on May 20, 2019, before the assigned judge, the Honorable Natalie Mai. However, when Judge Mai gave priority to another case for jury trial, *Burks* was included among other cases sent to the Chief Judge pursuant to local court Rule 6 for potential reassignment to another available judge for the sole purpose of conducting the trial.

In what would later appear to be no mere random selection, Respondent accepted the *Burks* case for trial – a case in which the defendant was represented by an attorney who not only made substantial monetary contributions to Respondent's campaign, but also played a significant role in

other fundraising activities as well. In direct contravention to its obligations under the Code of Judicial Conduct and longstanding opinions of the Judicial Ethics Advisory Panel, Respondent proceeded to make a number of pre-trial evidentiary rulings calculated to cripple the prosecution of the case in favor of her benefactor without ever disclosing to the District Attorney's Office the fact of defense counsel's campaign activities or even other information which might reasonably cast a doubt as to her neutrality. *See generally*, O.R., Exhibit 1, T.R. Though the case was only temporarily transferred from Judge Mai on the morning of trial, Respondent commented that she read the preliminary hearing transcripts for no explicable reason, questioned the veracity of witness testimony, criticized the State's rationale for filing the charge, excluded photographic evidence depicting the brutality of the attack, and even attempted to direct the State on how to question its witnesses and how those witnesses were to testify concerning the nature of the dogs involved in the attack. Respondent's rulings made it evident that she did not wish the jury to see the truth; in effect, Respondent sought to give to vicious dogs more civil rights than the innocent victim who had been killed by them. And to what end? Those answers would gradually reveal themselves.

Unbeknownst to the State at the time Respondent undertook the *Burks* case, defense counsel was one of the top five individual campaign contributors according to Respondent's 2018 quarterly Campaign Contributions and Expenditure Report and a co-sponsor of a campaign fundraiser; notably, however, the full extent of his contributions could not be known because, in

flagrant violation of the Rules of the Ethics Commission and the Code of Judicial Conduct, Respondent had yet to file her final campaign report which was due on or before January 31, 2019. O.R., Exhibit 4, T.R., p. 25-26, 33-34, 37, 40-49; Exhibit 37-1 through 37-14. In fact, defense counsel believed his own campaign involvement in support of Respondent was so significant that he even requested Respondent's opponent and then sitting incumbent District Judge Michele McElwee to recuse from a case he had before her prior to the election. Also undisclosed was information that Respondent's own dog was involved in an attack on another animal – an attack severe enough to require Respondent to pay the injured dog's veterinary expenses. *See generally*, O.R., Exhibit 1, T.R.

Upon learning of information that reasonably called into question Respondent's bias, the State sought her recusal from the matter. Rather than approaching the request with the cold neutrality demanded of the judiciary, Respondent outwardly displayed her contempt for the District Attorney's Office in a most unusual and injudicious fashion. Respondent not only chastised the District Attorney for seeking her recusal in front of an invited audience of her campaign supporters, but also undertook a defense of her impartiality complete with a PowerPoint presentation of her own dog. *See* O.R., Exhibit 3, T.R., p. 14, 19, 20, and 24. During the hearing, Respondent made two separate declarations that defense counsel had donated only \$500 to her campaign and even quipped: "Generally, my shoes cost more than that." *See* O.R., Exhibit 3, p. 14, 24. Respondent's statements, however, would later be discovered to be

patently false. See O.R., Exhibit 4, p. 41-49 and Exhibits 37-8, 37-10 through 37-12. Because the *Burks* case was temporarily transferred to Respondent for the purposes of trial alone, when the case was left untried, Rule 6 mandated that it be returned to Judge Mai as the regularly assigned District Judge. In fact, the case was expressly ordered to be returned to Judge Mai's docket. O.R., Exhibit 5, Trans. Orders. With the case returned to its assigned judge, the State abandoned its efforts to have Respondent recused, as the matter had become moot – or so it had seemed at the time.

Despite the plain language of Rule 6, on May 30, 2019, defense counsel in *Burks* filed a motion to have the case remain on Respondent's docket. Holding no regard for the Rules of the Ethics Commission and the Code of Judicial Conduct, it would come as no surprise that Respondent would hold the local court rules in equal disregard. Accordingly, on June 21, 2019, Respondent entered an order attempting to reset the case on its trial docket – a tactic which failed in light of the express order of the Chief Judge. O.R., Exhibit 6, Coleman Order. Discontent with the notion that her pretrial rulings would have no binding effect on another district judge and seemingly bent on returning campaign favors or vindicating some other deeply held prejudice, Respondent crossed boundaries of appropriate judicial conduct once again. In an act that reveals the depths of Respondent's bias against the District Attorney's Office and her desperation to retain a case involving one of her biggest campaign contributors, Respondent approached Judge Mai in a private conversation and urged that she not accept return of the *Burks* case. O.R.,

Exhibit 7, Aff. of Judge Mai, ¶8. Judge Mai rightly refused Respondent's improper request. Months later and for unrelated reasons, Judge Mai recused *sua sponte*; yet, the *Burks* case found its way to the permanent assignment of Respondent's docket. O.R., Exhibit 7, Aff. of Judge Mai, at ¶ 10; Exhibit 8, Transfer Order to Coleman.

In the face of unprecedented and shocking disregard for the rule of law by a District Judge who is sworn to uphold it with steely neutrality, the District Attorney confirmed that Respondent's Campaign Contributions and Expenditure Report remained unfiled before taking affirmative, yet confidential, enforcement action. O.R., Exhibit 9, Sealed Exhibit A. Thereafter, Petitioner made an *in camera* request for Respondent to recuse from all cases involving the District Attorney's Office on the grounds that the action taken by Petitioner created objective concerns about Respondent's ability to remain neutral in all cases involving the District Attorney's Office. O.R., Exhibit 10, T.R., p. 4-24. Though the District Attorney's request was unusual, it was driven by the extent of bias displayed by Respondent coupled with the jaw-dropping lengths to which she had already demonstrated she will go to exert improper influence both overtly and covertly. To be sure, Respondent has unlimited capability to deprive the State of Oklahoma of the constitutional guarantees of due process and a fair tribunal, as Respondent is a district judge assigned to a docket exclusively of criminal cases and the District Attorney's Office files over 10,000 cases a year. O.R., Exhibit 33, Brief in Support of Rehearing, at p. 11.

Just as in the proceedings in *Burks*, Respondent displayed open hostility towards the District Attorney and his First Assistant during the *in camera* hearing. O.R., Exhibit 10, T.R., p. 4-8, 14-24. And just as before, Respondent continued to actively withhold information about her campaign donors. When asked directly about persons who made campaign contributions in her favor, Respondent declined to provide such information to the District Attorney's Office. When asked directly when her Campaign Contributions and Expenditure Report could be expected to be filed, Respondent again refused to provide such information. O.R., Exhibit 10, T.R., p. 17-18, 21.

During the course of the *in camera* proceedings, Respondent indicated her belief that Rule 15 required case-by-case request for recusal as opposed to the "blanket" request sought by the District Attorney. *See* O.R., Exhibit 10, T.R., p. 8-9. In response, the District Attorney stated: "If the Court would – would rather, I guess we could identify every single case that's set before the Court and uh – and make that request specifically in every single case number, but that doesn't seem like a good use of the Court's time. It doesn't seem appropriate in that – in considering that the circumstances regarding this matter." *See* O.R., Exhibit 10, T.R., p. 9. Yet, despite her stated belief that only case-by-case challenges were appropriate, Respondent acted with open hostility to each request made in individual cases and even reached the point of threatening to hold the First Assistant District Attorney in contempt of court as he attempted to make individualized records. *See e.g.* O.R., Exhibit 11, CF-

2017-2721, T.R., p. 6-12; Exhibit 12, CF-2016-1571, T.R., p. 6, 10-11; Exhibit 13, CF-2018-3924, T.R.

Unwilling to bend to Respondent's abuse of power, on September 4, 2019, the "District Attorney's Motion to Recuse Judge Kendra Coleman Pursuant to Rule 15 of the Rules for the District Courts of Oklahoma" was filed in order to guard the constitutional right of due process and the guarantee that justice be administered without sale or prejudice. *See* O.R., Exhibit 14, Motion to Recuse. The matter was set for hearing for September 19, 2019. No one, save Respondent, could have known that still other misdeeds remained hidden beneath the surface – that is, until they were brought to light by the investigative reporting of The Oklahoman and a subsequent indictment by the Multi-County Grand Jury. *See* O.R., Exhibit 15, Exhibit 16.

On September 11, 2019, the front page of The Oklahoman read: "Embattled judge delinquent on taxes." Therein, the article reported that Respondent had unpaid federal taxes and even unfiled tax returns from 2010 through present as well as unpaid business taxes due the county spanning a period of five years. *See* O.R., Exhibit 15, Newspaper Article 9/11/19. The allegations were serious. After all, the failure to file tax returns is a felony offense if done with the intent to defraud the State, and a misdemeanor offense if done without fraudulent intent. 68 O.S.2011, §§ 240, 241.1(A). In fact, following the news report, the Multi-County Grand Jury returned a four-count misdemeanor Indictment against Respondent for Failure to File State Tax Returns for not one, but four years. O.R., Exhibit 16, Indictment. Petitioner

later dismissed the Indictment in CM-2019-3063 and charged Respondent with the felony crime of Failure to File State Tax Returns in Case No. CF-2019-4488. O.R., Exhibit 17, Information. Prosecution of this charge continues to this date. O.R., Exhibit 18, Docket Sheet, CF-2019-4488.

The Oklahoman quoted Respondent as replying to the allegations, not by denying their truth, but by stating: "I'm a regular person with regular issues the same as everyone else in the world.... It's life. These things happen. And by no way, by no means, am i [sic] minimizing any of it. I'm saying this is my life." O.R., Exhibit 15, Newspaper Article 9/11/19. Despite holding a Bachelor's degree in Accounting and a Master's Degree in Business Administration in addition to her Juris Doctorate, the article states: "About her tax debt, Coleman blamed it on 'life circumstances' and starting a business right out of college without any guidance." O.R., Exhibit 15. But the allegations raised by The Oklahoma did not end with Respondent's tax problems. The article further reported that Respondent had been ticketed for speeding and parking violations over 40 times in the last six years and had in excess of \$400 in unpaid fines. O.R., Exhibit 15.

Following the shocking news reported by The Oklahoman, Respondent took to the airways in response on The Open Mic Talk Show on September 11, 2019. There Respondent did not deny the information revealed by The Oklahoman but, instead, contritely accepted full responsibility for her actions. Respondent stated: "I am only a person. And I had a past before I was elected. I had a past while I was elected. And I have not made a secret of that, it's just

been made public now.” O.R., Exhibit 19, Open Mic Talk Show, at 28:00-49:00.

In addition to the evidence uncovered by The Oklahoman, the District Attorney discovered that during one or more meetings occurring between September 6, 2019 and September 12, 2019, and in the presence of other judges, Respondent voiced her unfounded opinion that the District Attorney was a racist. Also discovered was a six-page type-written “Response to District Attorney’s Motion to Recuse the Honorable Judge Kendra Coleman” in which Respondent made findings of fact and conclusions of law denying the motion to recuse filed on September 4, 2019. *See* O.R., Exhibit 20, Predetermined Order.

With new information coming to light since the filing of the original motion to recuse and in an effort to comply with Rule 15 of the *Rules for District Courts of Oklahoma*, the District Attorney requested a second *in camera* conference before Judge Coleman prior to the start of the hearing on September 19, 2019. Respondent denied the request. Judge Coleman reasoned that the only matter proper for her consideration was the original Motion to Recuse filed on September 4, 2019, and that any subsequent request for recusal had to be presented at a future date. *See* O.R., Exhibit 4, T.R., p. 3-8, 58-59. In essence, therefore, Respondent sought to construe the disqualification procedures to not only require individualized requests in every case on her docket – which come with threat of contempt of court when she tires of the same – but to also require successive requests in every case.

Lurking just beneath the surface of her rulings is the unmistakable intent to contort court rules and the law in a manner that would present a clear obstacle to the District Attorney in his quest to vindicate important constitutional rights; hardly the hallmark of judicial neutrality and impartiality. Unfortunately, it would neither be the last nor the most egregious abuse of power by Respondent that day.

Having been denied the opportunity for an *in camera* hearing, the District Attorney's Amended and Supplemental Motion to Recuse was filed prior to the start of the evidentiary hearing. *See* O.R., Exhibit 21, Amended Motion to Recuse. The hearing began with the District Attorney inquiring of Judge Coleman if she had already made up her mind as to the issues to be determined. Naturally, Respondent professed she had not – a response that was less than surprising given her repeated assertions of neutrality while actively concealing her own biases in direct contravention of the Code of Judicial Conduct. *See* O.R., Exhibit 4, T.R., p. 13-15. The District Attorney then proceeded to offer for admission the "Response to District Attorney's Motion to Recuse the Honorable Judge Kendra Coleman." *See* O.R., Exhibit 20, Predetermined Order. The Court admitted the document into evidence as Exhibit 1 and stated that she had, in fact, authored the document as part of her preparations for the hearing and even suggested Associate District Judge Richard Kirby might have breached the privacy of her chambers to obtain it; evidence would later reveal she made no secret of the document, as Presiding

District Judge Prince and possibly others were aware of its existence prior to the hearing as well. *See O.R., Exhibit 4, T.R., p. 15-17, 100.*

Undoubtedly recognizing the damning nature of her predetermined findings of fact and conclusions of law, midway through the hearing, Respondent attempted to reverse her prior decision to admit the document into evidence and, instead, claimed to withdraw the exhibit from the record to take under advisement whether the same should be filed under seal. *See O.R., Exhibit 4, T.R., p. 15-17, 95-97.* Likewise, Respondent denied Petitioner's requests to admit into evidence proof of her unpaid federal, state, and county tax liabilities, unfiled tax returns, and the Multi-County Grand Jury Indictment charging her with multiple counts of Failure to File State Tax Returns on the specious grounds that the same were irrelevant. *See O.R., Exhibit 4, T.R., p. 57-68; Exhibit 16; Exhibit 22, State Tax Warrants and Releases; Exhibit 23, Federal Tax Liens; Exhibit 24, Notices of Ad Valorem Taxes Due.*

Feeling confident in her obfuscation of the State's evidence, when it came time to render her decision, Respondent read from her predetermined findings of fact and conclusions of law. In fact, as the District Attorney and his Assistants followed in reading along, Respondent even stopped reading from her pre-prepared ruling to comment that she had made some edits from the original version admitted into evidence as State's Exhibit 1. *See O.R., Exhibit 4, T.R., p. 116-17.* Disingenuously, Respondent denied the request for disqualification, in part, on the grounds that there was insufficient evidence of her bias. *O.R., Exhibit 42, Order Denying Recusal.*

In accordance with the procedures set forth by Rule 15 of the *Rules for the District Courts of Oklahoma*, on September 24, 2019, Petitioner filed his request for rehearing by the District Court on the issue of Respondent's disqualification. There, Petitioner outlined twelve different grounds which justified Respondent's disqualification from all cases involving the District Attorney's Office; each ground was supported by evidence in the record or to be presented during rehearing that demonstrated actual bias and/or objective circumstances which would cast doubt on Respondent's neutrality. O.R., Exhibit 33, Brief in Support of Rehearing, p. 14-19. The State then waited for the matter to be set for hearing by the judge specially assigned to conduct the re-examination, the Honorable Lori Walkley. However, that day never came. O.R., Exhibit 48, Order. Without an opportunity to offer evidence or argument, the court flatly dismissed Petitioner's request to disqualify Respondent by Order entered on November 6, 2019. O.R., Exhibit 48.

Unequivocally, Judge Walkley was moved by the State's evidence, as her order expressly provides: "IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that the allegations set forth in this matter shall be referred by the undersigned to the Council on Judicial Complaints so that the appropriate remedy, if any, can be ascertained through the appropriate channels. In so doing, this Court authorizes the Council on Judicial Complaints, through this Order, to have access to all of the materials on file herein, including but not limited to matters which were previously filed under seal." O.R., Exhibit 48, p. 6. Nevertheless, the court declined to consider the same compelling evidence

on the question of disqualification. Instead, the court found that the State's failure to make case-by-case requests for recusal – even at the risk of being held in contempt by Respondent for doing so – prohibited the question from being addressed on its merits. O.R., Exhibit 48.

ARGUMENT AND AUTHORITY

What began with *Burks* evolved into a clear pattern and practice of conduct by Respondent that evinced not only the objective appearance that she could not impartially preside over a criminal docket but harbored actual bias against the District Attorney and his Office. At the time the District Attorney began his efforts to uncover the truth about Respondent's campaign contributions, he could not have known that a chain of events was set in motion that would result in extensive public embarrassment and financial expense for Respondent and culminate with felony charges being brought against a sitting judge – all of which evoked a wrath within Respondent that has so far shown no bounds. Despite the District Attorney's efforts to avail himself of the protections afforded by statute and court rule, he has been wrongfully denied any meaningful consideration of the overwhelming evidence of Respondent's bias.

I. THE DISTRICT COURT ON REHEARING ABUSED ITS DISCRETION IN REFUSING TO CONSIDER THE MERITS OF THE DISTRICT ATTORNEY'S REQUEST TO DISQUALIFY RESPONDENT.

It is well established that this Court reviews a lower court's decision to deny a party's request for recusal for an abuse of discretion. *Nguyen v. State*, 1992 OK CR 81, ¶ 19, 844 P.2d 176, 181. "An abuse of discretion has been

defined as a clearly erroneous conclusion and judgment, one that is clearly against the logic and effect of the facts presented or, stated otherwise, any unreasonable or arbitrary action taken without proper consideration of the facts and law pertaining to the matter at issue." *Gordon v. State*, 2019 OK CR 24, ¶ 5, ___P.3d___. In the matter *sub judice*, the district court on rehearing abused its discretion in two significant respects; namely, the court erred in construing the disqualification procedures as prohibiting, as a matter of law, a categorical request for recusal and further erred in applying standards of civil procedure to justify a ruling other than on the merits and without an evidentiary hearing.

A. THE RULE 15 PROCEDURES MUST BE CONSTRUED TO BE HARMONIOUS WITH THE STATUTES AND CONSTITUTIONAL PROVISIONS THEY ARE DESIGNED TO EFFECTUATE AND, PROPERLY CONSTRUED, ARE NO BAR TO CONSIDERATION OF THE STATE'S REQUEST TO DISQUALIFY RESPONDENT.

As an initial matter, the rehearing court abused its discretion in concluding that, as a matter of law, the right to seek recusal of a biased judge could only be exercised on a case-by-case basis.

Rule 15 of the *Rules for District Courts of Oklahoma* sets forth the procedures to be followed by a party to seek recusal of the assigned judge in a civil or criminal case. Rule 15, *Rules for District Courts of Oklahoma*, Title 12, Ch. 2 Appx. (2019). Though promulgated by the Oklahoma Supreme Court, this Court has held that a party to a criminal case must comply with the procedures set forth by Rule 15 in order to properly preserve the issue for

appellate review. *Mitchell v. State*, 2006 OK CR 20, ¶ 84-86, 136 P.3d 671, 705-06.

As recognized by the Oklahoma Supreme Court, Rule 15 of the *Rules for District Courts of Oklahoma* was adopted to implement Section 1403 of Title 20. *Pierce v. Pierce*, 2001 OK 97, ¶ 6, 39 P.3d 791, 795. That statute provides:

Any party to any cause pending in a court of record may in term time or in vacation file a written application with the clerk of the court, setting forth the grounds or facts upon which the claim is made that the judge is disqualified, and request said judge to so certify, after reasonable notice to the other side, same to be presented to such judge, and upon his failure to do so within three (3) days before said cause is set for trial, application may be made to the proper tribunal for mandamus requiring him so to do.

20 O.S.2011, § 1403. Though Section 1403 speaks of “any cause” in the singular, the Legislature in its wisdom has also enacted within Title 25 certain definitions and meanings of words to be used in the construction of statutes. Section 25 of Title 25 states: “Words used in the singular number include the plural, and the plural the singular, except where a contrary intention plainly appears.” 25 O.S.2011, § 25. By virtue of this Legislative mandate, therefore, Section 1403 **must** be construed to include the plural of causes, not merely the singular, unless a contrary intent appears.

It is here we turn to rules of statutory interpretation which confirm that there is no prohibition against the manner in which the District Attorney choose to bring his recusal request. As thoroughly articulated by this Court in *State v. Iven*, 2014 OK CR 8, 335 P.3d 264:

It is a fundamental principle in statutory construction that we must ascertain and give effect to the intention of the Legislature.

Legislative intent is to be determined first by the plain and ordinary language of the statute. A statute should be given a construction according to the fair import of its words taken in their usual sense, in conjunction with the context, and with reference to the purpose of the provision.

State v. Iven, 2014 OK CR 8, ¶ 13, 335 P.3d 264, 269 (internal citations and quotations omitted). Certainly, nothing in the plain language of Section 1403 indicates a clear intent that “cause” be construed only in the singular.

In its finding to the contrary, the court on rehearing placed particular emphasis on the language of Rule 15 which requires that an *in camera* recusal request be made no less ten days before the matter is set for trial and provision of Section 1403 which requires a motion to be filed no less than three days before trial. 20 O.S.2011, § 1403; Rule 15(a), *Rules for District Courts of Oklahoma*, Title 12, Ch. 2 Appx. (2019). In addition, the court found it significant that notice to opposing counsel of the request for recusal was required. However, compliance with these restrictions may still be accomplished even with a categorical request for recusal.

Within Oklahoma County, the schedule of jury trials is set by Administrative Order. As reflected by Administrative Order AO7-2018-23, jury trials typically begin on two days of any given month with a period of 14 days, sometimes more, between trial dates. O.R., Exhibit 50, Adm. Order, *In re 2019 Jury Weeks*. With trial settings at least 14 days apart, compliance with the deadlines of Rule 15 and Section 1403 is possible without resort to a case-by-case recusal method. So too is compliance with provisions requiring notice to opposing counsel. Here, the State not only gave the Public Defender express

notice, but notice was posted to all members of the Criminal Defense Lawyers Association, as well as by publication in the Journal Record. O.R., Exhibit 29, Aff. of Pub.; Exhibit 4., T.R., p. 18-19 During the recusal hearing before Respondent, opportunity was given to any defense attorney who wished to participate in the proceedings. O.R., Exhibit 4, T.R., p. 55, 103.

That Section 1403 is properly interpreted to encompass the plural as well as the singular "cause" is reaffirmed when viewed in context of the very purpose of the statute. Section 1403 was enacted to curb an abuse of the process of disqualification which, prior to 1909, mandated a judge's recusal upon the filing of an affidavit by a party alleging bias on the part of the court. *Ingles v. McMillan*, 1911 OK CR 52, 113 P. 998, 1000. As explained by this Court:

Judges were constantly disqualified by defendants not overscrupulous in the use of their oaths, where no cause either real or apparent for change of judge existed, and where it was sought for the palpable purpose only of delaying, obstructing, and ultimately defeating judges. The affidavit was generally filed after the case was called for trial, and after a motion for a continuance and after an additional motion for a change of venue had been filed and overruled. The fact that no notice of the filing of such affidavit had been given, and the state had gone to all the trouble and expense of preparing for trial, and had its witnesses present at the cost of the county, was immaterial. Often the trial calendar was deranged and the business of the court thrown into confusion. Either a continuance resulted, or else an exchange of districts by the disqualified judge with some other district judge was necessitated, usually involving a loss of time aggregating about two days for each judge, and always the expenditure by the state of the traveling and boarding expenses of each judge thus assigned to a district other than his own. The practice of disqualifying judges upon the ground of prejudice had been so much abused that it had fallen into great disrepute. In the majority of cases, it was the last resort of a desperate criminal to delay and defeat justice. Dissatisfaction with reference to this abuse became so general and

pronounced that the Governor recommended that the Legislature enact such laws as would do away with disqualifying judges upon this ground, and the Legislature was on the point of complying with this recommendation of the Governor when they were advised that such a law would be repugnant to section 6 of article 2 of our Constitution, which is as follows: "The courts of justice of the state shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice." The Legislature was further advised that, while they could not abolish the right of a change of judge upon the ground of prejudice, yet they did have the power to provide reasonable and proper regulations by which the question of prejudice could be decided. In response to this advice and the demand which existed for relief, the Legislature passed the act of 1909.

Id. Given the clear intent of the Legislature to curb the increased costs and overall disruption of the work of the courts through the enactment of Section 1403, the categorical request for recusal is entirely consistent – and even further accomplishes – the legislative goals.

Though no published opinion of this Court or the Supreme Court has considered the propriety of categorical disqualification, it is not the first such request to be made before any court. *See e.g., State v. Bednar*, 2019 OK 12, ¶48, 441 P.3d 91, 106 (noting that the trial court judge made a categorical recusal from all existing and future cases in which Bednar was a party). This Court was presented with that very scenario in *State v. Adair*, No. MA-2017-1059 (December 6, 2017). There, a District Attorney filed a similar categorical request to disqualify a district court judge from presiding over all criminal and civil cases involving law enforcement. The State urged that the judge had made a number of statements indicating he found testimony of various law enforcement officers to be untruthful, embellished, or exaggerated which the

prosecutor viewed to evince bias against law enforcement in general – so much so that the judge even undertook his own investigation in one instance. The trial court considering the issue, found that Rule 15 did not prohibit such a categorical request, *per se*, but ultimately found such relief to be unwarranted. Instead, the trial court granted relief by transferring certain individual cases from Judge Adair. O.R., Exhibit 52, *State v. Adair*, No. MA-2017-1059 (December 6, 2017).

On writ of mandamus this Court denied extraordinary relief and affirmed the decision of the trial court; in so doing, this Court implicitly concluded the categorical request was not procedurally invalid. Nevertheless, upon review of the merits of the issues presented, this Court concluded that the State's evidence did not establish Judge Adair to be biased against all law enforcement. O.R., Exhibit 52. Though one judge in partial dissent opined that Rule 15 was expressly limited to case-by-case challenges, in his Special Concurrence, Judge Hudson spoke directly to the validity of the categorical request for disqualification:

In extreme cases, an appropriate remedy (depending, of course, upon the particular facts of the case) may be the categorical disqualification of a trial judge from hearing cases involving certain issues, witnesses or parties. The Oklahoma Constitution guarantees that “[t]he courts of justice of this State shall be open to every person ... and right and justice shall be administered without sale, denial, delay, or prejudice.” And “[d]ue process guarantees an absence of actual bias on the part of the trial judge. Rule 15, Rules for District Courts in my view authorizes the drastic remedy of disqualification of a biased judge from an entire category of present and future cases – without resort to administrative transfer remedies – to vindicate these constitutional commands.

O.R., Exhibit 52, *State v. Adair*, No. MA-2017-1059 (December 6, 2017)(Hudson, J. Specially Concurring)(internal citations omitted).

Make no doubt that the circumstances of the case at bar are likely the perfect storm that necessitates categorical recusal. After all, the undisputed facts establish that Respondent cannot be viewed as impartial towards the District Attorney and his Office. This party-specific bias coupled with Respondent's assignment to a docket consisting exclusively of criminal cases means that it would be utterly futile and inefficient to require case-by-case motions to disqualify. Without question, the grounds for each case-specific motion would be the same and the evidence presented in support thereof would be the same. Undoubtedly, Respondent's decision on each of the motions would remain the same – that is, of course, assuming the prosecutor urging the motions was not held in contempt as Respondent tired of hearing the same motion being presented time and again; after all, Respondent reached that point after just three the first time case-by-case motions were attempted. Yet the fact that the perfect storm has converged to this point does not diminish the magnitude of the State's interests at stake. It is here that the rehearing court's analysis lost sight of the very reason for which Rule 15 and Section 1403 exist – to zealously guard the constitutional guarantee that justice be administered without sale or prejudice.

Over one hundred years ago, this Court recognized that the State, just as much as a criminal defendant, has a right to a fair trial by an impartial tribunal that may be protected by seeking recusal of a biased judge. *State v.*

Brown, 1912 OK CR 371, 126 P. 245, 248-49. As recognized by this Court, “We are required to construe our statutes liberally and in connection with the Constitution.” *State v. Brown*, 1912 OK CR 371, 126 P. 245, 248. This Court noted that the constitutional guarantee that justice be administered without sale or prejudice is “self-executing, so that [a party] could not be deprived of such a right by neglect of the Legislature to provide a remedy for its enforcement.” *Id.* If adherence to these principles is to be true, the rules and statutes put in place to protect the right of due process cannot, by judicial interpretation, be made an obstacle to deny the State the same right simply because the District Attorney is a party before a biased court who so happens to be assigned a docket exclusively of criminal cases.

B. THE REVIEWING DISTRICT COURT IMPROPERLY APPLIED THE OKLAHOMA PLEADING AS A BASIS TO JUSTIFY DISMISSAL OF THE STATE’S RECUSAL REQUEST WITHOUT NECESSITY OF AN EVIDENTIARY HEARING OR CONSIDERATION OF THE MERITS OF THE ISSUES PRESENTED.

In addition to improperly construing court rules and statutes to mandate that any request for disqualification be made on a case-by-case basis, the reviewing district court abused its discretion in failing to actually conduct a hearing on the issues to be determined and, instead, dismissing the request for review without consideration of the merits of the issues presented.

As required by decisions of this Court, the State complied with Rule 15 in seeking Respondent’s disqualification. As required by Rule 15(a), Petitioner made an *in camera* request for Respondent to recuse as well as sought and was denied a second *in camera* hearing when new evidence came to light. After

Respondent's denial of the request following a hearing on the matter, the State made a timely request for reconsideration by another judge of the District Court pursuant to Rule 15(b). That section provides in relevant part:

Any interested party who deems himself aggrieved by the refusal of a judge to grant a motion to disqualify or transfer a cause to another judge may **re-present** his motion to the Chief Judge of the county in which the cause is pending or, if the disqualification of a Chief Judge is sought, to the Presiding Judge of the administrative district by filing in the case writing five (5) days from the date of said refusal a written request for re-hearing. A copy of the request shall be mailed or delivered to the Chief Judge or Presiding Judge, to the adverse party and to the judge who entered the original order. **If the hearing before the second judge** results in an order adverse to the movant, he shall be granted not more than five (5) days to institute a proceeding in the Supreme Court or the Court of Criminal Appeals for a writ of mandamus. Neither the Supreme Court nor the Court of Criminal Appeals will entertain an original proceeding to disqualify a judge or to direct a judge to transfer a cause to another judge unless it is shown that the relief sought was previously denied by the judge to whom that matter was **re-presented** in accordance with this rule.

Rule 15(b), *Rules for District Courts of Oklahoma*, Title 12, Ch. 2 Appx. (2019)(emphasis added). The plain language of the Rule is clear and unequivocal. The reviewing court was required to conduct a hearing at which the State would have the opportunity to “re-present” evidence supporting the request for disqualification.

The rational for giving a party a second hearing to present evidence anew before a different judge of the district court is self-evident. It would be quite the procedural anomaly to allow the only presentation of evidence to be made before the very judge that is alleged to be biased in the first instance and thereby require all subsequent reviewing courts to give any sort of deference to the facts found and credibility choices of the judge under review. In fact, the

circumstances of the present case illustrate the very necessity of the second evidentiary hearing. As reflected by the record, the hearing held before Respondent was nothing more than a sham. The evidence established that Respondent had literally pre-written her order denying the State's request for recusal and her evidentiary rulings were overtly designed to limit the scope of the evidence while disregarding other evidence as incredible or insufficient so as to allow her to reach her predetermined decision. *See O.R., Exhibit 20.*

Unequivocally, Rule 15 mandated that the State be given the opportunity to re-present evidence in support of the request to disqualify Respondent. There evidence which had been improperly excluded by Respondent could have been admitted and the Presiding Judge's attempts to invoke a privilege not to testify that belongs only to executive branch officials, *see Vandelay Entertainment LLC v. Fallin*, 2014 OK 109, ¶ 9-12, 343 P.3d 1273, 1276, could have been challenged.¹ In addition, the reviewing court would have had the benefit of hearing the witness testimony previously presented and judged its credibility and sufficiency anew. Rather than conduct a second evidentiary hearing as required by Rule 15, the reviewing court "determined sua sponte" that it was first proper to apply to the State's request to the Oklahoma Pleading Code as a test of its legal sufficiency. O.R., Exhibit 48, Order. To illustrate the

¹ On information and belief, Judge Prince was prepared to reassign Respondent to a civil docket. On information and belief, Judge Prince was confronted by Respondent and another judge and pressured under threats of racism if he made such a reassignment for the benefit of the District Attorney. In an effort to conceal those discussions, Judge Prince invoked the deliberative process privilege – a qualified privilege belonging to executive branch officials involved in policy-making decisions. O.R., Exhibit 4, p. 84-94. Had a second hearing been granted, the State intended to demonstrate not only the inapplicability of the privilege to testimony of a fact witness, but also that any such privileged had been waived by the Presiding Judge by virtue of his discussions of the content of those conversations with non-policymaking persons.

legal fallacy upon which the court's Order rests, it is first helpful to understand the basis for the procedures invoked.

As provided by the Oklahoma Pleading Code, a civil action is commenced by the filing of a Petition. 12 O.S.2011, § 2003. A Petition need do nothing more than contain a plain and simple statement of his or her cause of action against a defendant for a wrong for which the court may redress. 12 O.S.Supp.2013, § 2008. After being served with the Petition and Summons, *inter alia*, a civil defendant may file a motion seeking dismissal of the lawsuit on the grounds the Petition does not state a claim upon which relief may be granted. 12 O.S.2011, § 2012(B)(6). The Supreme Court in *Rogers v. Quicktrip Corp*, 2010 OK 3, 230 P.3d 853, articulated the standard to be applied by a district court in ruling upon a motion to dismiss for failure to state a claim.

The Court stated:

Motions to dismiss are generally viewed with disfavor. The purpose of a motion to dismiss is to test the law that governs the claim in litigation rather than to examine the underlying facts of that claim. A motion to dismiss for failure to state a claim upon which relief may be granted will not be sustained unless it should appear without doubt that the plaintiff can prove no set of facts in support of the claim for relief. When considering the defendant's quest for dismissal the court must take as true all of the challenged pleading's allegations together with all reasonable inferences that may be drawn from them. A plaintiff is required neither to identify a specific theory of recovery nor set out the correct remedy or relief to which he (or she) may be entitled. A quest for dismissal should be denied if relief is possible under any set of facts which can be established and is consistent with the allegations. A petition can generally be dismissed only for absence of any cognizable legal theory to support the claim or for insufficient facts under a cognizable legal theory.

Rogers v. Quicktrip Corp, 2010 OK 3, ¶ 4, 230 P.3d 853, 856.

Upon reaching the conclusion that Rule 15 did not allow categorical requests for disqualification, the court applied the standard for motions to dismiss a civil petition for failure to state a claim upon which relief may be granted as allowed by Section 2012(B)(6) of Title 12. On this basis, the court dismissed the State's request for disqualification rather than conducting the evidentiary hearing required by Rule 15 reasoning that, "There is no need to decide whether Movant's facts are sufficient to grant his request...." O.R., Exhibit 48, Order.

Notably, nothing in Rule 15 authorizes resort to the Oklahoma Pleading Code in adjudicating a request for disqualification. *See generally*, Rule 15, *Rules for District Courts of Oklahoma*, Title 12, Ch. 2 Appx. (2019). Nor are there any published opinions of the Supreme Court or this Court finding that the Code might be properly applied in any recusal proceeding. In fact, by its terms, the Pleading Code cannot be so applied. The provisions of Rule 15 are intended to apply to both civil and criminal cases. That they apply to criminal cases equally precludes application of the Pleading Code which "governs the procedure in the district courts of Oklahoma in all suits of a civil nature...." 12 O.S.2011, § 2001. This conclusion is further bolstered when it is considered that before the reviewing court was a motion for rehearing, not a civil Petition to which a motion to dismiss pursuant to Section 2012(B) may be directed. 12 O.S.2011, § 2012.

Petitioner has followed the procedures set forth by statute and court rule to not only request Respondent's disqualification, but to seek subsequent

independent review of her denial of that request. The reviewing court's *sua sponte* decision to refuse to consider the merits of the issues presented by the State's request and, instead, dismiss the same has deprived the State of any meaningful review of the evidence of Respondent's bias. The district court's refusal to perform its obligations under Rule 15 was an abuse of discretion that now warrants extraordinary relief.

II. PETITIONER IS ENTITLED TO MANDAMUS RELIEF TO DISQUALIFY RESPONDENT FROM PRESIDING OVER ALL CRIMINAL CASES IN WHICH THE DISTRICT ATTORNEY'S OFFICE APPEARS ON THE BASIS OF HER ACTUAL BIAS AND OBJECTIVE APPEARANCE OF PARTIALITY.

Notwithstanding the reviewing court's failure to conduct an evidentiary hearing and consider the merits of the State's request for recusal, Petitioner submits that the record before this Court contains overwhelming and uncontested evidence that establishes Respondent's actual bias against the District Attorney and his Office and other circumstances creating objective doubt as to her ability to be impartial in presiding over criminal cases.

As a general rule, a Petitioner requesting a writ of mandamus bears the burden of showing: (1) a clear legal right to the relief sought; (2) respondent's refusal to perform a plain legal duty not involving the exercise of discretion; and (3) the nonexistence of an adequate remedy under the law in the absence of mandamus. Rule 10.6 (B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2019). Though involving the exercise of discretion, mandamus may also issue to require disqualification of a judge if the court's

refusal to recuse was erroneous or arbitrary. *Id.* Applying these principles to the case at bar, Petitioner is entitled to extraordinary relief.

A. THE STATE HAS A CLEAR LEGAL RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL AND TO HAVE RESPONDENT CATEGORICALLY DISQUALIFIED BASED UPON THE OVERWHELMING EVIDENCE OF BIAS AGAINST THE DISTRICT ATTORNEY AND HIS OFFICE.

In the broadest sense, the State has a clear constitutional right to due process of the law and a fair and impartial tribunal that is guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and Article 2, Sections 6 and 7 of the Oklahoma Constitution. The State also has a clear legal right to have a judge who cannot remain neutral disqualified from presiding over its cases. *State v. Brown*, 1912 OK CR 371, 126 P. 245, 248-49.

More particularly, the State had a clear legal right to disqualify Respondent in light of the evidence in the record that casts doubt upon her ability to remain impartial. Specifically, the evidence shows the following:

- (1) Respondent failed to automatically disqualify from all cases involving the District Attorney and his Office in light of her unfounded personal belief that the District Attorney is a racist in violation of Rule 2.11 of the Code of Judicial Conduct. *See e.g.* O.R., Exhibit 19, The Open Mic Talk Show airing September 11, 2019, at 37:00-37:16 (remarking about the interview's choice of words in saying "lynch mob.")
- (2) Respondent has repeatedly failed to voluntarily disclose information that might give rise to reasonable question about her impartiality including: failing to disclose the significant campaign contributions of defense

counsel in *State v. Burks*; intentionally and falsely disclosing that defense counsel in *State v. Burks* donated only \$500.00 to her campaign after the issue was raised by the District Attorney's Office but before the truth was learned by the District Attorney; failing to disclose a private incident involving a dog attack when presiding over the criminal case in *State v. Burks* of similar facts; refusing to provide information concerning all campaign contributions upon request of the District Attorney; and refusing to indicate when her final Campaign Finance and Expenditure Report would be expected to be filed upon request of the District Attorney. *See e.g.*, O.R., Exhibit 4, T.R.; Exhibits 37-1 through 37-15, ¶10; Exhibit 3, T.R., p. 14, 24; Exhibit 1, T.R.

- (3) Respondent has repeatedly attempted to pressure other judges to act in a manner adverse to the District Attorney and his Office including: attempting to pressure Judge Mai into transferring a particular case to Respondent; and attempting to pressure Presiding Judge Prince from transferring her from a criminal docket through intimidation and/or unfounded claims of racism. *See e.g.*, O.R., Exhibit 4, p. 76, 84-94; Exhibit 37-15, ¶ 8.
- (4) Respondent has repeatedly and deliberately disregarded court rules in order to effectuate her desired outcome to the disadvantage and prejudice of the District Attorney's Office including: disregarding the procedure for temporary transfer of cases pursuant to Local Court Rule 6; and disregarding the procedure of Rule 15 in denying a request for a

second *in camera* hearing. *See* O.R., Exhibit 4, p. 3-7; Exhibit 3, p. 20-23.

- (5) Respondent has repeatedly displayed actual bias and prejudice through open hostility towards the District Attorney and his Assistants following both individual requests for recusal as well as throughout the pendency of the instant request. *Wilkett v. State*, 1984 OK CR 16, ¶ 3-6 674 P.2d 573, 575 (hostility of court to recusal request raises doubt as to ability to remain impartial). *See e.g.*, O.R., Exhibit 3, T.R., p. 19, 20-25; Exhibit 11; Exhibit 12; Exhibit 13.
- (6) Respondent has demonstrated actual bias and prejudice in predetermining the issue of recusal. *C.R.B. v. State*, 1978 OK CR 22, ¶ 3-5, 575 P.2d 636, 637-38 (err in failing to recuse where judgment predetermined). *See e.g.*, O.R., Exhibit 20, Response to District Attorney's Motion to Recuse the Honorable Judge Kendra Coleman; Exhibit 4.
- (7) Respondent has demonstrated actual bias and prejudice in attempting to manipulate the scope and/or outcome of the hearing on the issue of her disqualification by filing her untimely Campaign Finance and Expenditure Report on the eve of the hearing; denying the District Attorney's request for a second *in camera* hearing pursuant to Rule 15; excluding evidence bearing directly upon her appearance to be fair, neutral and impartial in presiding over criminal proceedings. *See e.g.*, O.R., Exhibit 4 and Exhibit 37-1 through 37-15; Exhibit 15, Newspaper

Article September 11, 2019; Exhibits 22, State Tax Warrants and State Tax Releases; Exhibit 23, Federal Tax Liens; Exhibits 24, Notice of Ad Valorem Taxes Due 2014-2018; Exhibit 16, Indictment; Exhibit 2, Campaign Report.

- (8) Respondent has a pattern and practice of conduct which gives the objective appearance that she places herself above the criminal law including: willfully failing to file Campaign Contribution and Expenditure Reports in disregard to the Rules of the Ethics Commission and the Code of Judicial Conduct; failing to pay federal, state, and county taxes owed; incurring an excessive number parking and traffic tickets in short period of time; failing to pay outstanding traffic and parking fines; and publicly minimizing the significance of her disregard for the law as the mere ordinary incidents of life. *See e.g.*, O.R., Exhibit 4 and Exhibits 37-1 through 37-15; Exhibit 15, Newspaper Article September 11, 2019; Exhibits 22, State Tax Warrants and State Tax Releases; Exhibits 23, Federal Tax Liens; Exhibits 24, Notice of Ad Valorem Taxes Due; Exhibit 16, Indictment; *see also e.g.*, Exhibit 19, The Open Mic Talk Show airing September 11, 2019, at 28:00-49:00; Exhibit 17, Information.
- (9) Respondent has a pattern and practice of conduct which gives rise to the objective appearance that she will not faithfully and impartially enforce the criminal laws and punishments provided therefor in any criminal prosecution including: incurring an excessive number parking and traffic tickets in short period of time; failing to pay outstanding traffic and

parking fines; and willfully failing to file State Tax Returns. *See e.g.*, O.R., Exhibit 15, Newspaper Article September 11, 2019; Exhibit 16, Indictment; Exhibit 17, Information.

(10) As a result of the District Attorney bringing to light Respondent's failure to comply with the Rules of the Ethics Commission and Code of Judicial Conduct through her willful failure to file her final Campaign Contribution and Expenditure Report in a timely manner, or otherwise truthfully disclose information concerning her campaign contributors, a series of events has been set in motion that would give rise to the objective appearance that Respondent would be biased, prejudiced, and likely to retaliate against the District Attorney and his Office. In particular, as a result of the District Attorney's actions, Respondent has: been subjected to significant negative public scrutiny; had additional evidence of her private financial difficulties revealed by the media; and likely incurred additional expenses to retain assistance from others to rectify the delinquency of her campaign reports and unfiled tax returns, pay outstanding fee assessments to the Ethics Commission, and outstanding parking and/or traffic tickets. Succinctly stated, the District Attorney's efforts to recuse Respondent, and the resulting public notoriety for her misconduct and lawlessness, have resulting in Respondent expending significant time and financial resources aimed at righting those wrongs and salvaging her public reputation, a precious commodity for an elected official. No objectively reasonable observer

could conclude that Respondent, particularly in light of her other actions, would be free from bias against a party who caused her such public embarrassment and personal financial distress. *See e.g.*, O.R., Exhibit 15, Newspaper Article September 11, 2019; Exhibit 32, Appendix to Request for Rehearing, at Ex. 22, Newspaper Article September 18, 2019, Ex. 23, Newspaper Editorial Article September 21, 2019, Ex. 30, Newspaper Article September 5, 2019, and Ex. 31, Newspaper Article September 20, 2019, attached thereto.

- (11) The pending pursuit to enforce the rule of law as contained in sealed Exhibit A to the motions to recuse gives rise to the objective appearance of bias and prejudice against the District Attorney's Office. *See e.g.*, O.R., Exhibits 9, 14, 21.
- (12) Respondent's pending felony charge of Failure to File a State Income Tax Return, which is being prosecuted by the District Attorney's Office, gives rise to the objective appearance of bias and prejudice against the State of Oklahoma in all criminal matters. *See* O.R., Exhibit 16, Indictment; Exhibit 17, Information.

Notably, throughout the course of the proceedings, the sufficiency of the State's evidence to justify Respondent's disqualification has never been disputed, except by Respondent herself. Rather, the only point of contention has been the categorical nature of the State's request. O.R., Exhibits 38, 42, and 48. Though the district court on rehearing declined to consider the merits of the issue of disqualification, it cannot go unmentioned that the

overwhelming nature of the evidence in the cold record moved the court to refer the matter to the Council on Judicial Complaints for appropriate consideration. O.R., Exhibit 48. Under these circumstances, Petitioner has established a clear legal right to have Respondent disqualified from presiding over all criminal cases that the District Attorney and his Office prosecutes.

B. RESPONDENT'S REFUSAL TO RECUSE WAS CLEARLY ERRONEOUS AS WAS THE DISTRICT COURT'S REFUSAL TO CONSIDER THE MERITS OF THE ISSUE OF BIAS ON REHEARING.

The circumstances presented by the present case evince Respondent's actual bias against the District Attorney and his Office, which extends beyond the confines of any particular case. In fact, the totality of the evidence establishes that Respondent will breach all bounds of appropriate judicial conduct outside of judicial proceedings in order to manipulate outcomes inside those proceedings – all to an end that only she can know. Perhaps it is her efforts to retaliate against the District Attorney because she perceives him a racist. Perhaps it is to return campaign favors. Perhaps there is other nefarious motivation. But make no mistake the reason for her misconduct is irrelevant; all that is relevant is that she has set aside her duty to be fair, impartial, and unbiased.

The significant evidence of actual bias and prejudice of Respondent against the District Attorney and his Office, without more, justifies the extraordinary measure of disqualifying her from all cases in which the District Attorney's Office appears. However, when it is also considered that there is overwhelming evidence – even shocking evidence – that would lead any

reasonable person to question Respondent's ability to remain fair and impartial, the question becomes an easy one.

As demonstrated in Proposition I, the grounds upon which the reviewing district judge based its Order to dismiss the State's request for disqualification and refuse consideration of the issues presented are an abuse of discretion for which mandamus may lie to correct. The categorical request for disqualification is authorized by Section 1403, as the Legislature directs that the statutory language encompass the plural as well as the singular and no contrary intent to limit it to a case-by-case request is unequivocally expressed. As Rule 15 exists to implement Section 1403, it cannot be construed and applied to be more narrow through judicial interpretation and the artifice of the Oklahoma Pleading Code. Simply stated, it is clearly erroneous and arbitrary to interpret the very statutes and court rules designed to guarantee a party's right to a fair and impartial tribunal so narrowly as to avoid consideration of the issue altogether and effectively deny the right through inaction. As such, the State has met its burden of establishing the second element necessary for mandamus to issue.

C. THE STATE HAS NO OTHER ADEQUATE REMEDY UNDER THE LAW TO GUARANTEE ITS RIGHT TO A FAIR TRIAL BUT FOR MANDAMUS TO ISSUE COMPELLING RESPONDENT'S CATEGORICAL DISQUALIFICATION.

In dismissing the State's request for rehearing, Judge Walkley found comfort in her belief that there existed other avenues to protect the State's right to a fair trial other than the categorical disqualification of Respondent. Unfortunately, such comfort was predicated on false notions which were

unsupported by the record – misconceptions which could have been corrected had the court conducted a second evidentiary hearing and heard arguments on the question under review.

Initially, the reviewing court noted that the power of the Presiding Judge to make appropriate case assignments is the first safeguard of the State's right to a fair trial in circumstances such as these. As a matter of theory, the State agrees with the principle. Unfortunately, that safeguard has woefully failed. As reflected by Administrative Order AO7-2018-29, Respondent is permanently assigned to the criminal division of the district court. O.R., Exhibit 49, Adm. Order. That assignment has not changed even in light of the State's repeated protestations of Respondent's partiality and abuse of power. O.R., Exhibit 4, p. 90.

As reflected by the record, Petitioner made an *in camera* request for Respondent to categorically recuse on September 3, 2019. O.R., Exhibit 10. Under the extant authority of the Supreme Court, once a party has sought disqualification of a judge pursuant to Rule 15, the court may not proceed with the case further until the issue of disqualification has been fully adjudicated. *Miller Dollarhide, P.C. v. Tal*, 2007 OK 58, ¶¶ 8-10, 163 P.3d 548, 552. In fact, the Court has found it to be reversible error for a trial court to proceed to judgment without ruling upon a timely filed request for recusal. *Clark v. Bd. of Educ.*, 2001 OK 56, ¶¶ 7, 12, 32 P.3d at 854-56. The rational for the requirement to stay the proceedings is clear – it is grounded not in the language of any statute or court rule, but rather the constitutional provisions

for which those statutes and rules are designed to protect. As aptly explained by the Supreme Court:

A fundamental requirement of due process is a fair and impartial trial. A neutral and detached judiciary is imperative to ensure procedural fairness to individual litigants and to preserve public confidence in the integrity of the judicial process. Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. A challenge to an assigned judge for want of impartiality presents an issue of constitutional dimension which must be resolved and the ruling memorialized of record after a meaningful evidentiary hearing. The quest for recusal may not be ignored, nor is a judge free to proceed with the case until the challenge stands overruled of record following a judicial inquiry into the issue. Want of a record ruling upon this critical issue subjects the moving party to a trial before a judge whose challenged impartiality goes untested.

Id. at, ¶¶ 6-7, 12, 32 P.3d at 854. “Under the teachings of *Clark*, when a trial court is presented with a request to disqualify, ***it is not a matter of discretion*** to refrain from presiding over the case until the disqualification ruling is memorialized and the movant has, at the movant’s option, exhausted the Rule 15 procedure.” *Miller Dollarhide*, 2007 OK 58, ¶ 10, 163 P.3d at 552 (emphasis in original).

Respondent ignored these clear directives of the Supreme Court and continued to preside over her assigned criminal docket over the repeated objections of the State. *See generally*, O.R., Exhibits 11-13. It was not until the Presiding Judge entered Administrative Order AO7-2019-32, that Respondent’s disregard for the Rule 15 procedures was halted. O.R., Exhibit 51, Adm. Order. Notably, however, the Presiding Judge did not alter Respondent’s permanent assignment to the criminal division; rather, he simply put in place a temporary order that allowed Respondent to call another docket

until such time as the Rule 15 process had been exhausted. O.R., Exhibit 51, ¶ 3. It also cannot go unnoticed that the temporary assignment appears to be a concession of sorts by the Presiding Judge – one made with awareness that Respondent had ignored the authority of the Supreme Court and with the awareness of Respondent's unfounded belief that the District Attorney is a racist, but made under threats and pressure by Respondent. O.R., Exhibit 4, T.R., p. 84, 91-94; Exhibit 51. Lest there be any doubt that Respondent remains permanently assigned to the criminal division of the court, the Presiding Judge made clear "This Administrative Order may not be utilized by any litigant to argue that either Judge Coleman or Judge Kirby have been removed from their current, permanent assignments." O.R., Exhibit 51, ¶5.

In addition to the failed safeguard held by the Presiding Judge, the reviewing court also found comfort in the notion that the Court on the Judiciary could rectify the circumstances presented through outright removal of Respondent from the bench altogether. The court found:

the allegations in this matter go much further than simple allegations of bias. In this matter, the District Attorney alleges actions on behalf of Judge Coleman, which taken as true, would require her removal from the office of District Judge. Recusal is not an adequate remedy for the gross neglect of office, disregard for the Code of Judicial Conduct and the laws of the State of Oklahoma that the District Attorney has alleged in this matter. For these allegations, the appropriate tribunal is the Court on the Judiciary, through the process outlined in Article 7-A, § 2 of the Oklahoma Constitution.

O.R., Exhibit 48, p. 5. Here too, Petitioner agrees with the reviewing court as a matter of principle. It is evident from the evidence presented that Respondent is not fit to hold the office of District Judge. However, the fact that the

evidence of Respondent's bias and abuse of power also calls into question her fitness for office cannot serve as any legitimate justification for the district court to abdicate its responsibility in sitting in review of the State's request to categorically disqualify Respondent from hearing cases in which the District Attorney and his Office appears as a party. The function served by the Rule 15 procedures is to guarantee to the State as a party the right to a fair trial. In light of the reviewing court's failure to perform this function, the only available remedy to the State is extraordinary relief from this Court.

As noted in preceding sections, the circumstances of the present case have created the perfect storm that might not otherwise arise in another judicial district, for instance, one in which judicial assignments are not made by subject matter. Here, however, Respondent has been assigned a docket exclusively of criminal cases. O.R., Exhibit 49. An assignment that remains still today. Here, it is undisputed that there is evidence of Respondent's actual bias against the District Attorney and his Office and other circumstances reflecting upon her inability to remain objectively neutral in the conduct of criminal proceedings. In the words of Montesquieu, French philosopher and judge, "No tyranny is more cruel than that which is practiced in the shadow of the law and with the trappings of justice: that is, one would drown the unfortunate by the very plank by which he would hope to be saved." Charles de Secondat, Baron de Montesquieu, *Considérations sur les causes de la grandeur des Romains et de leur décadence*, ch. xiv (1734) contained in *Œuvres complètes*, vol. ii, p. 144 (R. Calillois ed. 1951)(S.H. transl.). Petitioner seeks

only to have the State's cases heard before a fair and impartial tribunal and pleads this Honorable Court to grant him that right which has been so far denied by Respondent, the Presiding Judge, and the District Court on rehearing. Accordingly, Petitioner asks this Court to assume jurisdiction and issue a writ of mandamus directing that Respondent be disqualified from presiding over any criminal case prosecuted by the District Attorney and his Office.

CONCLUSION

WHEREFORE, David W. Prater, District Attorney, respectfully prays that this Honorable Court will grant Petitioner's Application to Assume Original Jurisdiction and Petition for a Writ of Mandamus and order Respondent disqualified from presiding over any criminal case prosecuted by the District Attorney's Office.

Respectfully submitted,



DAVID W. PRATER, OBA # 15,496
DISTRICT ATTORNEY

JIMMY HARMON, OBA # 17,834
FIRST ASSISTANT DISTRICT ATTORNEY
320 Robert S. Kerr, Suite 505
Oklahoma City, OK 73102
Phone (405) 713-1600
Fax (405) 235-1567

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Brief in Support of Application to Assume Original Jurisdiction and Petition for Writ of Mandamus was hand-delivered to the following:

Robert A. Ravitz
Chief Public Defender
320 Robert S. Kerr Avenue
Oklahoma City, OK 73102

Kendra Coleman, District Judge
Oklahoma County Courthouse
321 Park Avenue
Oklahoma City, OK 73102

A handwritten signature in black ink, appearing to read "J.W.R.", is written over a horizontal line.